

# The Paradox of Liberal Constitutionalism: a Call for Communal Constitutionalism

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Massimo Fichera Do 10 Nov 2016

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The question whether or not, in troubled times, liberal constitutionalism is becoming a minority position, must address a paradox, which has been haunting it since its birth. While proclaiming itself a universal, all-inclusive doctrine, liberal constitutionalism has always been a particular doctrine for particular categories of individuals. The claim of liberal constitutionalism has been that the values it relies upon, e.g. the rule of law, human dignity, equality are worthy *as such*. Integration through law and communicative rationality would herald a new era of progress, whereby the laggards would not be left behind, and those standing *outside* would be let *inside*. The promising vocabulary of liberalism, enriched through the idiom of globalization, was formally at everybody's disposal. No one was supposed to be left out. This narrative has unfolded over the years, despite the strident contradictions hidden behind it. In reality, the vocabulary of liberalism was only at the disposal of some, not all. It excluded just as much as it included. It was often couched in terms of neutrality, while hiding divisiveness.

Transnational integration through law has stalled in the very place that was supposed to epitomize it: the European Union. Every time the people have been evoked, either as constituent power, or as circulating citizens within the internal market, or as masses of refugees escaping war or famine, the European Union has been called upon to put in practice its liberal democratic *ethos* – to no avail. Evoking the phantom of „We the People“ could work in the courtroom of the Court of Justice of the European Union, „tucked away in the fairyland Duchy of Luxembourg“, or in the pageantry of the official statements of Heads of State and Government, or of the European Commission – but it always stumbled upon the hurdle of the progressive detachment between the intellectual and financial elites and the „real people“, whatever this means.

The demise of documentary constitutionalism, the refugee crisis, the terrorism crisis, the economic and financial crisis, the rule of law crisis in Central and Eastern Europe and, more recently, Brexit, all point to one fundamental feature of the European liberal project: its navel-gazing, self-referential nature. The European liberal project seems focused on its *security* and all threats to its survival are addressed through measures that may even break the formal legislative framework that they support – while at the same time, the distance from the national or subnational level has increased. More generally, constitutionalism has become de-localized, detached from the *local* level, the place where the „real people“ live. The reaction to globalization – one of the reasons explaining the rise of Trump – is also a response to this delocalization.

If the above is true, what lies ahead? This reflection does not imply a retreat to the old nation State, with its idiosyncrasies and implausible categories. However, we should be careful when we embrace the new transnational paradigm. If dialogue can take place, this must not forget that constitutionalism's soul must be looked for at the local level, not in the fluid transnational arena – beyond the seemingly neutral vocabulary of technocracy, and reaching out to a physical *space* where claims can be put forward, resources allocated, boundaries defined, and decisions contested, within touching distance. What lies ahead is a field of possibilities for a form of *communal* constitutionalism, one that seeks to avoid the pitfalls of the nation State and does not relinquish the helm to transnational governance – and yet, maintains a constructive relationship with both. Citizens need to be involved in grass root movements, voicing their concerns and institutionalizing their demands. An example can be the spread of Green parties' activism in Germany and other countries, but many other models may be recalled.

Any reference to the “people” may simply turn into empty shells, a fiction that we keep employing to reassure ourselves, if no proper attempt to reconstruct the social texture of our communities is made. Communal constitutionalism is an invitation not to lose touch with the ground, and, rather than flying up towards the high skies of liberal constitutionalism, keep an eye on the concrete challenges that the return of the political poses. “Taking back constitutionalism“, or „make constitutionalism great again“ may be the new motto.

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